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No. 84-719

In the Supreme Court of the United States

OCTOBER TERM, 1984

MARK WAYNE AND PHOEBE WAYNE, HIS WIFE,
Petitioners,

vs.

TENNESSEE VALLEY AUTHORITY AND
TUPELO CONCRETE PRODUCTS COMPANY,
Respondents.

ON WRIT OF CERTIORARI FROM THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT, TUPELO CONCRETE PRODUCTS COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF FOR RESPONDENT, TUPELO CONCRETE PRODUCTS COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Mark Wayne and his wife Phoebe Wayne, constructed their home in 1968. They purchased concrete blocks in question in this lawsuit in October of 1968 [Petitioners' Statement of the Case erroneously states that the purchase occurred in 1978]. The original Complaint was filed in the United States District Court for the Northern District of

Mississippi on January 23, 1981, following publication of a newspaper article two years before in the Memphis, Tennessee, *Commercial Appeal*, which reported potential problems with "phosphate slag" used for manufacture of concrete blocks. (R. 252-253). No plaintiff has suffered any personal injury. (R. 254-255; 248).

At the trial level, Tupelo Concrete Products Company moved for summary judgment based upon the Tennessee Products Liability Act which contains a ten year statute of repose (10 Tenn. Code Ann. Section 29-28-103) and also upon the statute of limitations of the forum state, Mississippi, which provided a six year statute of limitations [Section 15-1-49. Miss. Code Ann. (1972)] and upon the further ground that plaintiffs admittedly had no claim for negligence. Thus, the remaining claims for breach of warranty and strict tort liability were barred under either Tennessee law or Mississippi law. The District Court and the Court of Appeals grounded the dismissal of this action on the Tennessee Products Liability Act of 1978 and its ten year statute of repose. (Pet. App. 1-36).

REASONS WHY WRIT OF CERTIORARI SHOULD NOT BE ISSUED

Respondent, Tupelo Concrete Products Company, contends that a Writ of Certiorari should not issue in this case for the following reasons:

I. The Court of Appeals for the Fifth Circuit used the proper standard in determining that no Federal common law statute of limitations should be fashioned in this action;

II. No Federal statute of limitations should be fashioned so as to apply to Tupelo Concrete Products Company, a private corporation where jurisdiction is based upon diversity of citizenship, 28 U.S.C. Section 1332;

III. The Tennessee Products Liability Act of 1978 is substantive and its ten year statute of repose was properly applied to bar the action in the court below;

IV. No Rule 17 reason exists for grant of the Writ of Certiorari.

ARGUMENT

I.

THE COURT OF APPEALS FOR THE FIFTH CIRCUIT USED THE PROPER STANDARD IN DETERMINING THAT NO FEDERAL COMMON LAW STATUTE OF LIMITATIONS SHOULD BE FASHIONED IN THIS ACTION

Petitioner complains that the Court of Appeals for the Fifth Circuit failed to apply the principles of *Clearfield Trust Co. v. United States,* 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1947). Fashioning federal common law is reserved for responding to uniquely federal problems. *Illinois v. City of Milwaukee,* 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972). There must be some significant conflict between application of federal policy or federal interest and state law. *Wallis v. Pan American Petroleum Corp.,* 384 U.S. 63, 68, 86 S.Ct. 1301, 1304, 16 L.Ed.2d 369 (1966); *Miree v. DeKalb County,* 433 U.S. 25, 53 L.Ed.2d 557, 97 S.Ct. 2490 (1977) announces the proper standard to be applied even in those cases which are considered "close".

Even in cases involving federal legislation, legislative intent to displace a contrary rule must be clear and unequivocal. *Texas Industries v. Radcliff Materials,* 451 U.S. 630, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981).

There is no significant federal interest affected by the issues at bar. As noted by the Court of Appeals, the Congress has deferred regulating phosphate slag pending a study of the need for such regulation which study is now in progress. 730 F.2d at 399.

The Court of Appeals further noted that the *time* for enforcing rights currently governed by state law does not present a unique federal requirement for regulation. 730 F.2d at 399. Indeed, it is rare for any federally fashioned rule of law to establish a limitation period not prescribed statutorily. None is cited by petitioner. It has only been in cases seeking enforcement of federally created rights that rules respecting limitations have been fashioned. *E.g. Ragan v. Merchants Transfer and Warehouse Co.*, 337 U.S. 530, 69 S.Ct. 1233, 93 L.Ed. 1520 (1949); *Holmberg v. Armbrecht*, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743 (1946).

Petitioners also argue that there is a conflict between the Court of Appeals' decision in the case at bar and that of the Court of Appeals for the Second Circuit in *In Re Agent Orange Product Liability Litigation*, 635 F.2d 987 (2d Cir. 1980). This respondent fails to see the conflict which requires resolution by this Court and in fact observes from a reading of *In Re Agent Orange* that federal common law rules were not fashioned since the application of state law posed no "threat to an 'identifiable' federal policy". 635 F.2d at 995. In fact, the Court of Appeals for the Second Circuit reversed the District Court determination to the contrary. It is the District Court's position which is actually advocated by petitioners. As in *Agent Orange*, the United States is not a party. Moreover, the United States has no apparent interest even in the outcome of this litigation. *Cf. Stevens v. Tennessee Valley Authority*, 712 F.2d 1047 (6th Cir. 1983).

II.

NO FEDERAL STATUTE OF LIMITATIONS SHOULD BE FASHIONED SO AS TO APPLY TO TUPELO CONCRETE PRODUCTS COMPANY, A PRIVATE CORPORATION WHERE JURISDICTION IS BASED UPON DIVERSITY OF CITIZENSHIP, 28 U.S.C. SECTION 1332

Jurisdiction as to the respondent, Tupelo Concrete Products Company is based upon diversity of citizenship, 28 U.S.C. Section 1332. *Erie Railroad v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) makes clear that there is no general federal common law. Certainly there is no compelling reason to fashion any federal common law as to any claim against Tupelo Concrete Products Company, a mere diversity defendant.

III.

THE TENNESSEE PRODUCTS LIABILITY ACT OF 1978 IS SUBSTANTIVE AND ITS TEN YEAR STATUTE OF REPOSE WAS PROPERLY APPLIED TO BAR THE ACTION IN THE COURT BELOW

Under the law of the forum state, Mississippi, Tennessee substantive law governs. *Mitchell v. Craft,* 211 So.2d 509 (Miss. 1968). No issue is raised on that point by petitioner. Mississippi treats a foreign statute of limitations as substantive if it terminates the very cause of action itself. *Cummings v. Cowan,* 390 F.Supp. 1251 (N.D. Miss. 1975); *Ramsay v. Boeing Co.,* 432 F.2d 592 (5th Cir. 1970). The right, not merely the remedy, is extinguished. *Davis v. Mills,* 194 U.S. 451 (1904).

The Tennessee statute of repose extinguishes the right, not merely the remedy, and is therefore substantive under Mississippi law. *Buckner v. GAF Corp.*, 495 F.Supp. 351 (E.D. Tenn. 1979).

The constitutionality of the Tennessee statute has been upheld not only on this appeal but also on prior considerations. *Harmon v. Angus R. Jessup Association,* 619 S.W.2d 522, 524 (Tenn. 1981); *Harrison v. Schrader,* 569 S.W.2d 822, 827-28 (Tenn. 1978); *Mathis v. Eli Lilly & Co.*, 719 F.2d 134, 141 (6th Cir. 1983).

This Court has long adhered to the principle that the decisions of lower Courts as to matters of local law determination should be viewed with deference by the Supreme Court even where local law may be construed differently without such guidance. *Henderson Company v. Thompson,* 300 U.S. 258, 57 S.Ct. 447, 81 L.Ed. 632 (1937); *Chardon v. Fumero Soto,* ..... U.S. ....., 103 S.Ct. 2611, 77 L.Ed.2d 74 (1983).

IV.

NO RULE 17 REASON EXISTS FOR GRANT OF THE WRIT OF CERTIORARI

Rule 17 of the Rules of the United States Supreme Court provides guidance respecting the Court's exercise of discretion in granting Writs of Certiorari. Although petitioners argue to the contrary, there is no Court of Appeals' decision in conflict with that of the Court below. Neither is the decision of the Court of Appeals for the Fifth Circuit in conflict with any state court of last resort. Moreover, there has been no departure from the accepted

and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

It is respectfully submitted that the application for Writ of Certiorari is frivolous and should be dismissed as meritless.

Respectfully submitted,

TUPELO CONCRETE PRODUCTS COMPANY,
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CERTIFICATE OF SERVICE

This is to certify that I, L. F. Sams, Jr., the attorney for the respondent, Tupelo Concrete Products Company, have this day delivered a true and correct copy of the above and foregoing Brief of Respondent, Tupelo Concrete Products Company, in Opposition to Petition for Writ of Certiorari to the persons listed below, by placing true and correct copies thereof in the United States Mail, proper postage prepaid addressed to them at the following addresses:

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DATED, this the 3rd day of December, 1984.

L. F. SAMS, JR.